

**THREE MEMBER DUE PROCESS HEARING PANEL  
EMPOWERED PURSUANT TO 162.961 R.S.MO.**

**HEARING DECISION**

**Student's Name:**

**Parents' Name:**

**Parents' Representative:**

**Mr. Matthew Hill  
Attorney at Law  
Dickerson, Hill, Fort, Greaser & Lange, L.L.C.  
102 N. Main  
Cape Girardeau, MO 63702**

**Local Education Agency:**

**Cape Girardeau 63 School District  
61 N. Clark  
Cape Girardeau, MO 63701**

**Agency Representative:**

**Ms. Diane Howard  
Attorney at Law  
Limbaugh, Russell, Payne & Howard  
P.O. Box 1150  
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**Ms. Teri B. Goldman  
Attorney at Law  
36 Four Seasons Center, #136  
Chesterfield, MO 63017**

**Hearing Dates:**

**November 13, 2001 and January 28, 2002**

**Date of Report:**

**May 13, 2002**

**Hearing Officers:**

**Patrick O. Boyle, Chairman,  
Beth Mollenkamp and  
George Wilson**

**THREE MEMBER DUE PROCESS HEARING PANEL  
EMPOWERED PURSUANT TO 162.961 R.S.MO.**

**Decision**

**Issue**

Parents of an autistic child filed a request for due process alleging that the only program which will provide a free appropriate public education (FAPE) for student is 40 hours per week for 52 weeks per year of an in home Applied Behavioral Analysis Program (ABA). Further, the parents invoked the stay-put provisions of IDEA to retain the present student placement which included 20 hours per week of in home ABA and, sought reimbursement for 20 additional hours of ABA and other expenses which they have incurred for special educational services not covered in the student's Individualized Educational Program (IEP).

### **Time Line**

Parents' first request for a due process hearing was received by the Missouri Department of Elementary and Secondary Education (DESE) on May 31, 2001. A Local Education Agency's (LEA) Request for Extension of Time for Decision was granted on July 9, 2001 and, the time for decision was extended to December 17, 2001. On August 6, 2001 hearings were scheduled for the week of November 13 to November 16, 2001.

On October 3, 2001 the LEA filed a Motion to Compel the parents to produce student for completion of his three year re-evaluation and to cooperate in the development of an IEP after completion of the re-evaluation. LEA's Motion was set for hearing on November 13, 2001.

On October 19, 2001 the parents' attorney requested that the due process hearing be continued and, that the time for decision be extended.

On October 25, 2001 the LEA filed a Motion to Dismiss the due process request for failure to comply with Statute of Limitation requirements and for seeking action from the LEA not required by the IDEA. The LEA Motion to Compel or in the Alternative to Dismiss the Student's Request for Due Process was heard on November 13, 2001 and, the panel entered an order that parents have no right to videotape the student's evaluation without the consent of the LEA. By stipulation, the parties agreed to re-evaluate the

student starting the week of November 26. A diagnostic staffing concerning re-evaluation of the student was to be held on or before January 4, 2002 and, an IEP meeting based upon the re-evaluation was to be held on January 10, 11, 14 or 15 based upon the availability of the parents. Parents' attorney agreed to provide a more definite statement of student's request for due process on or before December 13, 2001.

On November 14, 2001 the time for decision was extended to February 28, 2002 by consent of the parties and, the hearing was scheduled for four days beginning on January 28, 2002.

On December 3, 2001 the parents through their attorney filed a second request for due process. This request states that the LEA on November 16, 2001 met and determined the testing instruments to be used in student's re-evaluation without the parents' participation. Further, the parents state that they were not furnished the professional qualifications mandated under the testing protocols for the tests selected by the LEA. Parents again invoked the stay-put provisions which included 20 hours per week of ABA therapy for fifty weeks a year.

On December 13, 2001 parents' attorney filed a first Amended Due Process Complaint in the original requested action listing numerous specific complaints concerning procedure and educational methodology and requesting monetary reimbursement for extra special educational service expenses incurred by the parents.

Parents' attorney filed a Motion on December 14 to reconsider or set aside the Order of November 14 wherein the parents agreed to make the student available for re-evaluation.

On December 20, 2001 the LEA filed a Motion to Consolidate parents' two pending requests for due process hearings. This motion was granted on December 21, 2001 and, the second request was scheduled for hearing with the first request during the week of January 28, 2002 with decision due on or before February 28, 2002.

On January 8, 2002 the LEA filed its Motion to Dismiss student's first amended complaint due to the parents' failure to cooperate with the LEA's efforts to reevaluate the student. In addition, the Motion challenged parents' request to videotape the student's IEP meetings, the claims regarding educational methods, and the claims barred by limitations or laches.

The LEA filed a request for preliminary hearing on its Motion to Dismiss and, for a continuance of the hearing.

On January 15, 2002 an Order was entered setting a preliminary hearing for January 28, 2002, continuing the due process hearing and extending the time for decision to March 28, 2002 at the request of the LEA.

A preliminary hearing was held on January 28, 2002 and, the panel denied the parents' Motion to Reconsider or Set Aside the panel Order of November 14, 2001. Further, the panel found that parent's failure to produce the student for testing was a violation of the panel Order of November 14, 2001.

A new schedule for student testing was ordered and, the time for decision was extended to May 20, 2002 at the LEA's request with hearings scheduled for April 17 to April 19, 2002. Parents were ordered to file an amended request for due process setting forth the specific IEPs to be reviewed by the panel, allegations as to how these IEPs

failed to provide FAPE, allegations as to how the LEA failed to implement the IEPs, and details of any private placement being sought for the student. The amended request was to be filed on or before February 28, 2002.

On March 7, 2002 parents were ordered to show cause on or before April 1, 2002 why their request for due process should not be dismissed for failure to file an amended request as ordered by the panel on January 29, 2002.

On April 1, 2002 the LEA filed its Motion to Dismiss and for Sanctions for failure of the parents to comply with the panel's Orders. At 7:54 p.m. on April 1, 2002, the parents' attorney sent a fax response to the Order to Show Cause stating that parents' original requests for due process invoked the jurisdiction of this panel pursuant to Section 162.961.3 R.S.Mo. No amended request has been filed as ordered on January 28, 2002.

Decision is timely rendered herein prior to the time for decision as extended to May 20, 2002.

## **FACTS**

1. Student was born during of . (Ex. A)
2. Student was evaluated during March of 1998 and a finding of Pervasive Developmental Disorder was made at that time. (Ex. A)
3. Student received services through the First Steps Program following the 1998 evaluation. (Ex. A)
4. Student attended early childhood special education classes beginning in the Fall of 1998. (Ex. A)
5. Student's parents withdrew him from that setting in the Spring of 1999 to pursue a home based program. (Ex. A)
6. Individualized Educational Programs (I.E.P.s) were prepared for the student in May of 1999 and May of 2000. (Tr. 44 1/28/02)
7. No I.E.P. was prepared for the student during May of 2001 due to the incomplete nature of his three-year re-evaluation. (Tr. 44 and 45 1/28/02)
8. Special education services provided to the student under the I.E.P. of May 2000 consist of 20 hours per week of individualized special education services within the home, five hours per week at a University preschool for inclusion with children without disabilities and occupational therapy services. Parents did not accept part of the I.E.P. which provided additional hours in the individualized early childhood special education program containing goals and objectives for language, fine and gross motor and academics, social and emotional. (Tr. pp. 52-53)

9. At parents' request the LEA retained an Applied Behavioral Analysis (ABA) consultant from Jacksonville, Florida for six to eight consultations per year for the purpose of training paraprofessionals and reviewing the program. (Tr. 53, 54 and 69)

10. The LEA hired appropriate paraprofessionals located by the parents to form a program team consisting of the parents, the paraprofessionals and the ABA Consultant. (Tr. 54 and 55)

11. Parents paid the ABA consultant for consultations in addition to those provided by the LEA. (Tr. 69)

12. A notice of intent to re-evaluate the student was prepared by the LEA dated February 26, 2001. (Ex. 11)

13. The evaluation was necessary as the student would reach kindergarten age in the Fall of 2001 and, the I.E.P. team was required to determine if student had a categorical disability. (Ex. 11)

14. Student's father consented to the proposed re-evaluation on March 15, 2001. (Ex. 11)

15. Testing for the re-evaluation was discontinued by the student's parents on April 2, 2001 as the L.E.A. would not permit parents to videotape the testing session. (Ex. 13)

16. Parents filed their original request for due process with DESE on May 31, 2001.



17. Parent's initial request for due process received May 31, 2001 is three and one-half pages in length and, it states that the LEA violated the IDEA by placing the student in special education without conducting an evaluation and in failing to conduct a re-evaluation with a complete functional behavioral assessment prior to June 1, 2001. In addition, the request lists several specific criticisms of educational methodology and numerous general criticisms of unspecified IEPs. It sought stay put for the student in the student's present special education program and, reimbursement to the parents for various amounts spent by them for therapists and education services in addition to the special education services provided by the then current IEP.

18. The panel determined by its Order at the hearing of November 13, 2001 that the parents have no right to video tape the student's testing for evaluation purposes without the consent of the LEA.

19. At the hearing of November 13, 2001, the parents consented and the panel ordered that students re-evaluation be commenced with testing starting the week of November 26, 2001 for approximately ten hours of testing over a three week period. Parents agreed to make the student available for testing during that time frame.

20. Student's evaluation plan dated February 26, 2001 identified tests needed to complete student's educational evaluation. In addition to the plan the LEA sent a letter dated April 27, 2001 to the parents listing the additional tests needed. (Ex. 18)

21. Parents were informed at the hearing on November 13, 2001 that some of the tests may no longer be age appropriate and, that appropriate testing would be used. (Tr. 8 11/13/01)

22. An LEA letter dated November 16, 2001 advised the parents of the age appropriate tests and assessments to be used under the evaluation plan of February 26, 2001, furnished a schedule for testing starting on November 26, 2001, notified the parents that observations of the student would be made at the University preschool and requested data on the in home individual therapy from April 2000 to the current time. This letter was forwarded by the LEA attorney to the parents' attorney by facsimile transmission on November 19, 2001. (Ex. 20)

23. Parents did not respond to the LEA letter dated November 16, 2001. (Tr. 18 1/28/02)

24. A second LEA letter dated November 28, 2001 was sent to the parents with a testing schedule starting on December 3, 2001 and requesting the monthly progress reports on student's in-home program. (Ex. 21)

25. Parents did not respond to the LEA letter dated November 28, 2001 but, the parents' attorney sent a facsimile letter to the LEA's attorney on November 29, 2001 responding to the LEA letter of November 16, 2001 suggesting available dates and times for testing student. (Ex. 22)

26. On December 3, 2001 the parents' attorney filed a second due process request stating that the LEA could not substitute the age appropriate tests under the evaluation plan of February 26, 2001 without convening an evaluation planning team with the participation of the parents. Further, the due process request alleged that the LEA failed to provide notice to parents of the professional qualifications mandated by the age

appropriate tests selected. A new panel was requested to order an evaluation planning team meeting and, the stay-put provisions were invoked.

27. At the hearing of November 13, 2001 the parents' attorney agreed to provide a more definite and certain request for due process on or before December 13, 2001.

28. Parents' attorney mailed a first amended due process complaint on December 13, 2001. This complaint covered a placement by the LEA on July 22, 1998, a refusal by the LEA to permit the parents to video tape the student's three-year re-evaluation, the failure of the LEA to discuss a functional behavioral assessment of the student on July 22, 1998, the LEA failed to provide parents advance notice of a functional behavioral assessment administered on April 4, 1999, and the LEA failure to provide FAPE due to thirty-four listed items concerning educational methodology and IDEA procedure. The first amended due process complaint again sought monetary damages for the parents.

29. Parents' request for due process of December 3, 2001 was consolidated for hearing with the original request of May 31, 2001 as supplemented on December 13 by order of December 21, 2001.

30. The LEA has not been able to complete the student's three year re-evaluation for lack of several testing assessments. (Tr. 25 and 26 1/28/02) (Ex. A)

31. The LEA multidisciplinary team met with parents on January 10, 2002 and made a tentative diagnosis that the student is a child with autism. (Tr. 27, 40, 41, 51 and 52 1/28/02)

32. The LEA multidisciplinary team met with parents on January 18, 2002 but was unable to prepare an IEP for student due to the lack of a complete re-evaluation. (Tr. 27, 28, 49, 50, 51, 52 1/28/02)

33. The panel held on January 28, 2002 that the use of age appropriate assessments did not constitute a change in the student evaluation plan of February 26, 2001 and the parents' failure to produce the student for testing is a violation of the panel Order of November 13, 2001. (Tr. 86 1/28/02)

34. A new testing schedule for the student was adopted at the hearing of January 28, 2002. (Tr. 86-90 1/28/02)

35. A ruling was made that if the new testing schedule and re-evaluation of student were thwarted by the parents, the due process requests would be dismissed. (Tr. 90 1/28/02)

36. Parents' attorney was ordered to draft a new complaint subject to a two year limitation period from the date of filing, May 31, 2001, which identifies the IEP's questioned, states how the LEA failed to implement the IEPs, state in what manner the IEPs failed to provide a free appropriate public education, and statements identifying and justifying any private placement sought by the parents. Such complaint was to be filed by February 28, 2002. (Tr. 90, 91 1/28/02) Parents' failure to produce student for testing was found to be a violation of the panels Order dated November 14, 2001. (Order of January 29, 2002)

37. No amended complaint has been filed on behalf of the parents and, the Chairman entered a Show Cause Order to the parents on March 7, 2002.

38. Parents' attorney responded to the Show Cause Order on April 1, 2002 to the effect that no amended complaint is required since the panel's jurisdiction has been invoked under Section 162.961 R.S.Mo.

## **DECISION AND RATIONALE**

Parents' requests for due process received on May 31, 2001 and December 3, 2001 as supplemented by the first due process amended complaint dated December 13, 2001 are hereby dismissed with prejudice.

Parents have failed to cooperate with the LEA or the three-member panel in this process and, their request for monetary damages is beyond the jurisdiction of this panel. Further, the requests contain allegations concerning actions taken more than two years prior to the filing of May 31, 2001 which are barred by a two-year Statute of Limitation and, also contain allegations under Section 504 of the Rehabilitation Act which are beyond the jurisdiction of this panel. Finally, the parents' requests do not contain the contents required by regulation, 34 CFR 300.507(c).

## **APPEAL PROCEDURE**

Either party has the right to appeal this decision within 30 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri or to a Federal Court.

Panel Members Supporting  
Decision

Panel Members  
Opposing Decision

Patrick O. Boyle  
Beth Mollenkamp  
George Wilson